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No. 03-1111

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE SOUTH DAKOTA SECRETARY OF STATE
AND THE SOUTH DAKOTA ATTORNEY GENERAL,

Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Respondents' Brief in Opposition contends that the decision below is unremarkable and is consistent with decisions of other federal appellate courts. Yet, the court of appeals decision conflicts with this Court's commerce clause opinions. Cases from this Court list "discriminatory purpose" as one of the three stated bases for finding that a statute violates the dormant commerce clause, but not one actually relies on "discriminatory purpose" as the sole reason for doing so. In relying only on discriminatory purpose, the court of appeals decision conflicts with the more thorough analysis made by this Court on dormant commerce clause questions.

Respondents also argue that the case below does not present a matter of national constitutional importance because it only involves a few state laws with corporate farming statutes, none of which are as "draconian" as South Dakota law. The breadth of the court of appeals decision is, however, far-reaching in terms of both commerce clause constitutional analysis and corporate farming law.

I. THE QUESTIONS PRESENTED SEEK REVIEW OF A CONFLICT WITH THIS COURT'S DORMANT COMMERCE CLAUSE JURISPRUDENCE.

The Petition asserts that the court of appeals decision was flawed in holding (a) that a state law directed at two specific out-of-state companies is wrongfully discriminatory against interstate commerce and (b) that the purpose of a state law (as derived from the subjective intent of the

drafters) may, on its own, be sufficient cause to invalidate a state law under the dormant commerce clause.

The Respondents contend that the first of the arguments is wrong in relying on *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978). FB Brf. 11, 12.

The Petition relies on the Court's explanation in *Exxon*, that the "Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127-28. Pet. 12, 13. The court of appeals held that Amendment E was unlawful because its purpose or intent was to target two specific out-of-state companies.[1] Thus, the court of appeals conclusion directly conflicts with the above-quoted statement in *Exxon*.

Respondents attempt to distinguish *Exxon* by claiming that the Petition relies on dicta, that "any principle derived from *Exxon* has been narrowed over time," and that scholars do not regard it in the light presented in the Petition. Yet, the Court does not appear to regard this point as dicta and it has not been narrowed. The Court restated the premise in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (pointing out that in *Exxon*, "We stressed that the Commerce Clause 'protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.'"). In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987), the

[1] The two companies are Murphy Farms, Inc. and Tyson, Inc. The companies have been involved in numerous pollution and production contract disputes listed in the Petition. *See also Tyson Foods, Inc. v. Archer, et al.*, No. 03-649, 2004 WL 308127 (Ark. Feb. 19, 2004) (production contract dispute).

Court held that the "fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 580 n.13 (1997) (citing to *Exxon* and *CTS Corp.*). Various courts of appeal have also relied on the *Exxon* language in recent cases. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 213 (2d Cir. 2003); *Pharmaceutical Research and Mfrs. of America v. Concannon*, 249 F.3d 66, 84 (1st Cir. 2001); *Texas Manufactured Housing Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095, 1104 (5th Cir. 1996); *Kleenwell Biohazard Waste & General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 397 (9th Cir. 1995); *Ford Motor Co. v. Insurance Comm'r of Com. of Pennsylvania*, 874 F.2d 926, 944 (3d Cir. 1989). The Petitioners submit that the language in *Exxon* is still vital and supports granting review.

Respondents also take exception to the second part of the Petitioners' "purpose" argument – that discriminatory purpose should not be (and has not been) the sole criterion for determining whether a law is invalid under the dormant commerce clause. Respondents suggest that *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984) and other recent cases demonstrate that state legislation may be invalidated solely on the basis of "discriminatory purpose."

It is undeniable that *Bacchus* and other dormant commerce clause cases list "discriminatory purpose" as one of the stated bases for finding that a statute violates the dormant commerce clause. Yet, not one of the cases that does so actually lists "discriminatory purpose" as the *sole reason* for finding a state law unconstitutional. In *Bacchus*, for example, another facet of the test (discriminatory language of the act itself) applied and the parties conceded

that to be the case. Petitioners submit that discriminatory intent alone is inadequate to invalidate Amendment E under the dormant commerce clause.

With respect to Petitioners' second claim, Respondents also appear to make an alternative argument, reasoning that Amendment E is unconstitutional due to *both* its discriminatory intent and its effect on interstate commerce. They claim that "the Respondents in this case made a strong showing that Amendment E had a discriminatory effect on interstate commerce." FB Brf. 12. The Opposition Brief further alleges that Amendment E had an "adverse impact" on interstate commerce and argues that such effect was "substantial and far-reaching." FB Brf. 6, 7.

Yet, Respondents acknowledge (as they must) that the court of appeals did not look at the effect of the challenged law on interstate commerce at all. FB Brf. 12. The court of appeals did not consider interstate effect (or even the language of Amendment E) when it held "we rest our conclusion on the evidence in the record of a discriminatory purpose underlying Amendment E. As a result, we do not consider the other two tests, or the second tier analysis, the *Pike* balancing test." App. 18.

Respondents suggest that the court of appeals did not actually reject any of Respondents' claims that the challenged law had an adverse effect on interstate commerce. Reasoning that the court of appeals simply did not reach those claims (FB Brf. 14), Respondents appear to argue that they would be successful if the effect on interstate commerce had been examined. The "right for the wrong reason" salvage simply does not cure the problem: the

court of appeals relied on a flawed premise in conducting its constitutional analysis and it ought to be corrected.

II. THE QUESTIONS PRESENTED ARE NOT NARROW AND APPLY TO MORE THAN CONSIDERATION OF A UNIQUE SOUTH DAKOTA LAW.

Respondents argue that the case does not present a matter of national constitutional importance because it involves only a few states with corporate farming statutes, none of which are as "draconian" as South Dakota law. The breadth of the Eighth Circuit's decision in the case below is, however, far-reaching in terms of commerce clause constitutional analysis, and in the analysis of corporate farming statutes.

As set forth above, a critical question is whether a state law should be struck down solely on the strength of discriminatory purpose (subjective intent of the drafters). That issue alone has far-reaching significance. In the last twenty-five years, the Court has heard many cases on the dormant commerce clause involving matters in commerce such as solid waste, milk, liquor taxes, natural gas, and youth camps.[2] Cases involving the extent to which the states may regulate the scope of corporate conduct have, for example, involved a state law prohibiting processors and wholesalers from engaging in retail business (*Exxon*) and a law restricting the method for hostile takeovers. *CTS Corp.*, 481 U.S. 69. Each of these cases involve the

[2] *C&A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1944); *Clover Leaf Creamery; Bacchus; General Motors Corp. v. Tracy,* 519 U.S. 278 (1997); *Camps Newfound/Owatonna.*

same basic three-part dormant commerce clause test, but none have concluded that discriminatory intent alone is enough to invalidate state laws. Given the demonstrated breadth of the dormant commerce clause and its effect on business activities, the Questions Presented are far-reaching and are not limited to unique South Dakota laws.

Further, as stated in the Petition, the Questions Presented involve the extent to which states may restrict corporations in engaging in farming, owning farmland, or producing livestock. There are several states with various corporate farming provisions,[3] but none of the state corporate farming provisions have been analyzed under the dormant commerce clause by any appellate court except the Eighth Circuit. Because the Eighth Circuit is using a flawed test for analyzing corporate farming provisions, now is the time to ensure that the proper test is used before other state corporate farming provisions are analyzed in light of the Eighth Circuit criteria. While other state provisions may be somewhat less restrictive toward corporate farming,[4] the standard used by the Eighth

[3] Respondents assert that the South Dakota Attorney General was not candid in disclosing whether the provisions in other states are statutes or constitutional provisions. Yet, the Petition clearly cites to these state provisions. Pet. 3 n.3. There is one exception that was corrected and disclosed to all parties. When filed, the Petition erroneously referred to the North Dakota provision as a constitutional provision. Pet. 2. The word "statutory" was substituted in all copies of the Petition within days after the Petition was filed.

[4] Respondents assert that the South Dakota Attorney General exaggerated the scope of other state provisions. The Petition explains that the other state provisions are similar in that they restrict corporations from engaging in farming or owning farmland and does not suggest that other state laws are as restrictive as Amendment E or identical to Amendment E.

Circuit does not consider that issue. The Eighth Circuit simply considers whether the parties drafting the provision intended to discriminate against interstate commerce and does not analyze whether the provision actually does discriminate against interstate commerce. Consequently, under the Eighth Circuit criteria the relative scope of the restrictions would not be the deciding factor; the deciding factor would be the relative intent of the drafters. If the Eighth Circuit decision serves as precedent, other state corporate farming laws may be struck down if one or more drafters in those states intended to restrict interstate commerce, regardless of the language or effect of the actual provisions.

CONCLUSION

For the foregoing reasons and those in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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